SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

03/27/2002

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2001-000233

FILED: _____

STATE OF ARIZONA

BARTON J FEARS

v.

RAYMOND MARTINEZ JR

TAMARA D BROOKS PRIMERA

PHX CITY MUNICIPAL COURT
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #5933549

Charge: 3. EXTREME DUI

DOB: 09/11/45

DOC: 08/13/00

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter was scheduled for oral argument on March 6, 2002, but oral argument was vacated when counsel failed to appear. This case was deemed submitted on the Memoranda. This

decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. This Court has reviewed the record of the proceedings from the Phoenix City Court, and the Memoranda submitted by counsel.

Appellant, Raymond Martinez, Jr., was charged with three crimes: Count 1, Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(1); Count 2, Driving with a Blood Alcohol Content of .10 or Greater, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(2); and Count 3, Driving with a Blood Alcohol Content of .18 or Greater (Extreme DUI), also a class 1 misdemeanor, in violation of A.R.S. Section 28-1382. These crimes were alleged to have occurred on August 13, 2000. At the time scheduled for trial, Appellant entered guilty pleas to Counts 1 and 2, then moved to dismiss Count 3 on the basis that prosecution constituted double jeopardy. The trial court denied that motion and the parties submitted the case and waived their rights to a jury trial. The trial court found that double jeopardy had not attached and convicted Appellant of Count 3. Appellant has filed a timely Notice of Appeal in this case.

The only issue presented on appeal is whether the trial court abused its discretion and erred in denying Appellant's Motion to Dismiss. Appellant contends that the charges were multiplicitous and that the crime in Count 2 of Driving with a Blood Alcohol Content in excess of .10 [A.R.S. Section 28-1381(A)(2)] is not a lesser included offense of the crime of Extreme DUI. Appellant contends that his conviction of Count 3, Extreme DUI must be vacated. All of the issues raised by Appellant are questions of law which must be reviewed *de novo* by this Court.[1]

The double jeopardy clauses in the United States and Arizona Constitutions prohibit conviction for an offense and its

[1] *State v. Welch*, 198 Ariz. 554, 12 P.3d 229 (App. 2000).

lesser included offense.[2] Appellant contends that the crime of Driving with a Blood Alcohol Content Greater than .10 or more [A.R.S. Section 28-1381(A)(2)] is not a lesser offense of Extreme DUI. However, Appellant's arguments must fail when considering the elements of each offense. The elements for each crime are identical with the exception that the crime of Extreme DUI requires an additional element of having a blood alcohol content greater than .18. The test for a lesser included offense was summarized by Judge Erlich in State v. Welch,[3] as:

> An offense is a lesser included offense if it is composed solely of some, but not all, of the elements of the greater offense so that it is impossible to commit the greater offense without also committing the lesser. Put another way, the greater offense contains each element of the lesser offense plus one or more elements not found in the lesser (citations omitted).[4]

When two convictions are based on one act, and one is the lesser included offense of the other, the lesser conviction must be vacated.[5]

For the reason that the appropriate remedy appears to this Court to be to vacate the conviction of Count 2 [Driving with a Blood Alcohol Content Greater than .10, in violation of A.R.S. Section 28-1381(A)(2)], this Court need not address Appellant's multiple (double) punishment argument. Clearly, A.R.S. Section 13-116 is not violated when this Court vacates the conviction for Count 2.

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[2] Id.
[3] Id., 198 Ariz. at 556, 12 P.3d at 231.
[4] Id., citing *State v. Cisneroz*, 190 Ariz. 315, 317, 947 P.2d 889.891 (App.1997).
[5] Id.; State v. *Chabolla-Hinojosa*, 192 Ariz. 360, 965 P.2d 94 (App.1998); *State v. Jones*, 185 Ariz. 403, 916 P.2d 1119 (App.1995).

This Court, therefore, concludes, as did the Court of Appeals in State v. Welch[6] that vacating the conviction of the lesser included offense is the appropriate and correct remedy in this case.

IT IS THEREFORE ORDERED vacating Appellant's conviction for the crime in Count 2, Driving With a Blood Alcohol Content in Excess of .10, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(2).

IT IS FURTHER ORDERED affirming Appellant's convictions of Count 1 [Driving While Impaired, in violation of A.R.S. Section 28-1381(A)(1)]; and Count 3, Extreme DUI [in violation of A.R.S. Section 28-1382].

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court with instructions to vacate the conviction on Count 2, and for all further and future proceedings in this case.

[6] Supra.